

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 7230/2020 & CM.APPL. 24414/2020(stay)**

Date of decision: 2nd November, 2020

KIRAN GUPTA

..... Petitioner

Through: Mr. Sandeep Sethi and Mr. Amit Singh Chadha, Senior Advocates with Mr. Arvind Kumar Gupta and Ms. Henna George, Advocates

versus

STATE BANK OF INDIA & ANR.

..... Respondents

Through: Mr. Rajiv Kapur and Mr. Akshit Kapur, Advocates for respondent No.1/SBI.

Mr. Vikas Mehta and Mr. Apoorv Khator, Advocates for respondent No.3/IBBI.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. The short question which arises for consideration in this writ petition is as to whether a bank/financial institution can institute or continue with proceedings against a guarantor under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the SARFAESI Act'), when proceedings under the Insolvency and Bankruptcy Code 2016 (hereinafter referred to "IB Code") have been initiated against the principal borrower and the same are pending adjudication.

2. In the instant case, respondent No.4/M/s Metenere Ltd. is the principal borrower. Respondent No.4 (for short 'the Principal Borrower')

had obtained loans from the respondent/State Bank of India (for short, 'the Bank'). The petitioner, who is the wife of the promoter of the principal borrower, stood as a guarantor for repayment of the loans. The Bank filed an insolvency petition against the principal borrower under the provisions of the IB Code before the NCLT, Delhi.

3. During the pendency of the insolvency proceedings against the principal borrower, the Bank issued a Notice dated 06.09.2018 under Section 13(2) of the SARFAESI Act to the petitioner, who had stood as a guarantor for the principal borrower. The Notice issued under Section 13(2) of the SARFAESI Act was replied to by the petitioner. This was followed by issuance of a Possession Notice dated 16.07.2019, under Section 13(4) of the SARFAESI Act. Both the Notices i.e. one under Section 13(2) and the other under Section 13(4) of the SARFAESI Act were challenged by the petitioner by filing S.A.No.118/2019 before the Debts Recovery Tribunal-II, Delhi (for short 'DRT-II'). In view of the negotiations/settlement talks that were going on between the Bank and the Principal Borrower, S.A. No.188/2019 was withdrawn.

4. A fresh Notice under Section 13(2) of the SARFAESI Act was issued by the Bank on 11.06.2020. It is alleged by the petitioner that without issuing a Notice under Section 13(4) of the SARFAESI Act, the Bank has issued a Sale Notice dated 27.08.2020, under Rule 8(6) of Security Interest (Enforcement) Rules for sale of her residential house bearing House No.F-73, Preet Vihar, Delhi admeasuring 370 sq.yds, by public e-auction to be held on 14.10.2020.

5. In the Insolvency Petition, a Resolution Professional has been appointed by the learned NCLT, Delhi. It has also been stated by the petitioner that the Bank has filed OAs, being OA.550/2019 and 583/2019,

against the Principal Borrower for recovery of money before the DRT-II, Delhi.

6. Though, the petitioner had initially challenged various Notifications issued by the Union of India in the writ petition but, when the said petition came up for hearing before this court on 30.09.2020, Mr. Amit Singh Chadha, learned Senior Counsel appearing for the petitioner had stated on instructions that he would not be pressing prayer clauses (A) to (F) and had confined the relief in the petition to prayer clauses (G) to (M). The writ petition is now being confined to the action of the Bank of initiating proceedings against the petitioner under the SARFAESI Act when insolvency proceedings have been initiated against the Principal Borrower under the IB Code and the same are pending before the NCLT.

7. It is the contention of the petitioner that proceedings against the Principal Borrower under the IB Code and against the Guarantor under the SARFAESI Act cannot be instituted and continued simultaneously; unless the proceedings under the IB Code do not come to an end and it is decided that the company cannot be revived, proceedings against the Guarantor alone cannot go on; that if the Resolution Plan is accepted, then under Section 31 of the IB Code, all the Guarantees become ineffective as the Resolution Plan is binding on the Guarantors. A plea has been taken that after approval of the Resolution Plan under the IB Code, the liability of the Guarantor also comes to an end. It has also been stated that during the COVID-19 pandemic, the Bank would not be in a position to fetch a good value of the property and therefore, it will not be prudent to go ahead with the sale of the property.

8. Mr. Sandeep Sethi, learned Senior Advocate appearing for the petitioner contended that from the date of admission of an application for initiating Corporate Insolvency Process by the Adjudicating Authority, the

Adjudicating Authority by order declares a moratorium prohibiting institution or continuation of suits, arbitrations and other proceedings against the entity against which the insolvency proceedings have commenced. He submitted that Section 12 of the IB Code stipulates that the Insolvency Resolution Process has to be completed within a period of 180 days from the date of admission of the application and this period can be extended only by a maximum period of 90 days. Under Section 31 of the IB Code, once a Resolution Plan is submitted by the Resolution Professional and is approved by the Adjudicating Authority, then the same is binding on the guarantor and the guarantor is discharged from all his liabilities. It was therefore, the submission of Mr. Sethi that proceedings against the guarantor under SARFAESI Act should await the final decision under the IB Code. If the resolution process is accepted, then the guarantor is discharged of all his liabilities, but on the other hand, if the resolution process fails, then the Bank would be free to proceed against the principal borrower and the guarantor. He concluded by arguing that a reading of Sections 14 and 31 of the IB Code would warrant a stay on all proceedings against the Guarantor under the SARFAESI Act during the continuation of the Insolvency Resolution Process.

9. *Per contra*, Mr. Kapur, learned counsel appearing for the respondent/Bank submitted that the liability of a Guarantor is co-extensive with the Principal Debtor. He stated that the issue raised by the petitioner is no longer *res integra* and is covered by the judgment of the Supreme Court in State Bank of India v. V.Ramakrishnan and Another, reported as (2018) 17 SCC 394, which holds in so many words that Sections 14 and Section 31 of the IB Code do not bar initiation and continuation of the SARFAESI proceedings against the Guarantor.

10. Coming first to the relevant provisions, Sections 14 and 31 of the IB Code and Section 128 of the Contract Act, read as under:-

“Section 14 of IB Code.

Moratorium.-(1) *Subject to provisions of sub-section (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:-*

- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*
 - (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
 - (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(54 of 2002);*
 - (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*
- (2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.*
- 1[(3) The provisions of sub-section (1) shall not apply to-*
- (a) such transaction as may be notified by the Central Government in consultation with any financial regulator;*
 - (b) a surety in a contract of guarantee to a corporate debtor.]*

(4) *The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:*

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.”

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Section 31 of IB Code.

Approval of resolution plan.-(1) *If the Adjudicating Authority is satisfied that the Resolution Plan as approved by the committee of creditors under sub-section (4) of Section 30 meets the requirements as referred to in sub-section (2) of Section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, 2[including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed,] guarantors and other stakeholders involved in the resolution plan:*

3[Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.]

(2) *Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.*

(3) *After the order of approval under sub-section (1).-*

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

4 [(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:

Provided that where the resolution plan contains a provision for combination as referred to in section 5 of the Completion Act, 2002(12 of 2003), the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors.]

Section 128 of Contract Act.

Surety's liability.—*The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.*

11. Section 128 of the Contract Act provides that the liability of a Guarantor is coextensive with that of the Principal Debtor. In Industrial Investment Bank of India Limited v. Biswanath Jhunjunwala, reported as (2009) 9 SCC 478, the Supreme Court has observed as under:-

“14. Mr Gupta, in support of his submission, placed reliance on a judgment of this Court in Bank of Bihar Ltd. v. Dr. Damodar Prasad [AIR 1969 SC 297 : (1969) 1 SCR 620] , AIR p. 298, para 5. In that case, the Court referred to a judgment in Lachhman Joharmal v. Bapu Khandu [(1869) 6 Bom HCR 241] in which the Division Bench of the Bombay High Court held as under: (Lachhman case [(1869) 6 Bom HCR 241], Bom HCR p. 242)

“The court is of opinion that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt.”

15. This Court, while approving the said judgment, observed that: (Damodar Prasad case [AIR 1969 SC 297: (1969) 1 SCR 620] , AIR p. 299, para 6)

“6. ... The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down.”

16. In SBI v. Indexport Registered [(1992) 3 SCC 159 : AIR 1992 SC 1740] this Court held that the decree-holder bank can execute the decree against the guarantor without proceeding against the principal borrower. The guarantor's liability is coextensive with that of the principal debtor.

17. In that case, this Court further observed that: (Indexport case [(1992) 3 SCC 159 : AIR 1992 SC 1740] , SCC p. 164, para 10)

“10. ... The execution of the money decree is not made dependent on first applying for execution of the mortgage decree. The choice is left entirely with the decree-holder. The question arises whether a decree which is framed as a composite decree, as a matter of law, must be executed against the mortgage property first or can a money decree, which covers whole or part of decretal amount covering mortgage decree can be executed earlier. There is nothing in law which provides such a composite decree to be first executed only against the [principal debtor] [Ed.: The word in the original is “property”—however the import is the same: that a composite decree can be executed both against the principal debtor or the sureties.].”

The Court further observed that (Indexport case [(1992) 3 SCC 159 : AIR 1992 SC 1740] , SCC p. 165, para 13) “the liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract”. [Ed.: This is the verbatim text of Section 128 of the Contract Act, 1872.]

18. The term “coextensive” has been defined in the celebrated book of Pollock & Mulla on Indian Contract and Specific Relief Act, 10th Edn., at p. 728 as under:

“Coextensive.—Surety's liability is coextensive with that of the principal debtor.

A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety though the principal has not been sued.”

19. In Chitty on Contracts, 24th Edn., Vol. 2 at pp. 1031-32, para 4831 it is stated as under:

“4831. Conditions precedent to liability of surety.—Prima facie the surety may be proceeded against without demand against him, and without first proceeding against the principal debtor.”

20. In Halsbury's Laws of England, 4th Edn., Vol. 20, para 159 at p. 87 it has been observed that:

“159. ... It is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for.”

21. A Division Bench of the Bombay High Court in Jagannath Ganeshram Agarwala v. Shivnarayan Bhagirath [AIR 1940 Bom 247] held that the liability of the surety is coextensive, but is not in the alternative. Both the principal debtor and the

surety are liable at the same time to the creditors. A Division Bench of the High Court of Karnataka, in Hukumchand Insurance Co. Ltd. v. Bank of Baroda [AIR 1977 Kant 204] had an occasion to consider the question of liability of the surety vis-à-vis the principal debtor. The Court held as under: (AIR p. 208, para 12)

“12. ... The question as to the liability of the surety, its extent and the manner of its enforcement have to be decided on first principles as to the nature and incidents of suretyship. The liability of a principal debtor and the liability of a surety which is coextensive with that of the former are really separate liabilities, although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously.”

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27. The legal position as crystallised by a series of cases of this Court is clear that the liability of the guarantor and principal debtors is coextensive and not in alternative. When we examine the impugned judgment in the light of the consistent position of law, then the obvious conclusion has to be that the High Court under its power of superintendence under Article 227 of the Constitution of India was not justified to stay further proceedings in OA No. 156 of 1997. Consequently, the appeal is allowed and the impugned judgment of the High Court of Calcutta is set aside. The appellant shall be entitled to costs of Rs.50,000.” (emphasis added)

12. Since the liability of a guarantor is co-extensive with that of the principal debtor and not in the alternative, it cannot be said that proceedings in the NCLT against the principal debtor can be a bar to institution or continuation of proceedings against the guarantor under the SARFAESI Act.

13. The question as to whether the respondent/Bank can proceed against a guarantor even after initiation of proceedings under the IB Code also stands settled. As correctly pointed out by Mr. Kapur, learned counsel appearing for the respondent/Bank, the said issue is squarely covered by the judgment of the Supreme Court in State Bank of India (supra). Paras 20 and 25 of the said decision that answer the issue raised by Mr. Sethi, Senior Advocate against him, read as under:-

“20. Section 14 refers to four matters that may be prohibited once the moratorium comes into effect. In each of the matters referred to, be it institution or continuation of proceedings, the transferring, encumbering or alienating of assets, action to recover security interest, or recovery of property by an owner which is in possession of the corporate debtor, what is conspicuous by its absence is any mention of the personal guarantor. Indeed, the corporate debtor and the corporate debtor alone is referred to in the said section. A plain reading of the said section, therefore, leads to the conclusion that the moratorium referred to in Section 14 can have no manner of application to personal guarantors of a corporate debtor.

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25. Section 31 of the Act was also strongly relied upon by the respondents. This section only states that once a resolution plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, under Section 133 of the Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the resolution plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the respondents, it is clear that in point of fact, Section 31 is one more factor in

favour of a personal guarantor having to pay for debts due without any moratorium applying to save him.” (emphasis added)

14. The view expressed by the Supreme Court amply demonstrates that neither Section 14 nor Section 31 of the IB Code place any fetters on Banks/Financial Institutions from initiation and continuation of the proceedings against the guarantor for recovering their dues. That being the position, the plea taken by the counsel for the petitioner that all proceedings against the petitioner, who is only a guarantor, ought to be stayed under the SARFESI Act during the continuation of the Insolvency Resolution process qua the Principal Borrower, is rejected as meritless. The petitioner cannot escape her liability qua the respondent/Bank in such a manner. The liability of the principal borrower and the Guarantor remain co-extensive and the respondent/Bank is well entitled to initiate proceedings against the petitioner under the SARFESI Act during the continuation of the Insolvency Resolution Process against the Principal Borrower.

15. In view of the above discussion, we do not find any merit in the writ petition, which is accordingly dismissed alongwith the pending application.

SUBRAMONIUM PRASAD, J.

HIMA KOHLI, J.

NOVEMBER 2, 2020

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